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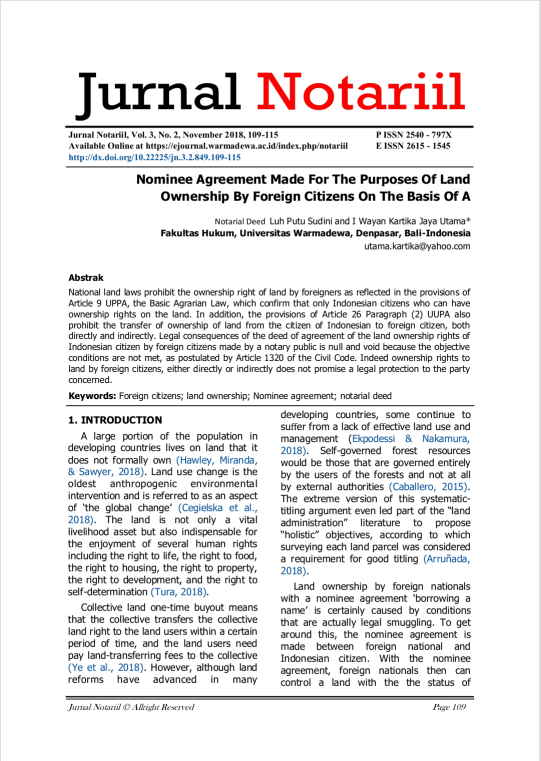

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Nominee Agreement Made For The Purposes Of Land Ownership By Foreign Citizens On The Basis Of A

Notarial Deed Luh Putu Sudini and I Wayan Kartika Jaya Utama*
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Abstrak

National land laws prohibit the ownership right of land by foreigners as reflected in the provisions of Article 9 UPPA, the Basic Agrarian Law, which confirm that only Indonesian citizens who can have ownership rights on the land. In addition, the provisions of Article 26 Paragraph (2) UUPA also prohibit the transfer of ownership of land from the citizen of Indonesian to foreign citizen, both directly and indirectly. Legal consequences of the deed of agreement of the land ownership rights of Indonesian citizen by foreign citizens made by a notary public is null and void because the objective conditions are not met, as postulated by Article 1320 of the Civil Code. Indeed ownership rights to land by foreign citizens, either directly or indirectly does not promise a legal protection to the party concerned.

Keywords: Foreign citizens; land ownership; Nominee agreement; notarial deed

1. INTRODUCTION

A large portion of the population in developing countries lives on land that it does not formally own (Hawley, Miranda, & Sawyer, 2018). Land use change is the oldest anthropogenic environmental intervention and is referred to as an aspect of 'the global change' (Cegielska et al., 2018). The land is not only a vital livelihood asset but also indispensable for the enjoyment of several human rights including the right to life, the right to food, the right to housing, the right to property, the right to development, and the right to self-determination (Tura, 2018).

Collective land one-time buyout means that the collective transfers the collective land right to the land users within a certain period of time, and the land users need pay land-transferring fees to the collective (Ye et al., 2018). However, although land reforms have advanced in many developing countries, some continue to suffer from a lack of effective land use and management (Ekpodessi & Nakamura, 2018). Self-governed forest resources would be those that are governed entirely by the users of the forests and not at all by external authorities (Caballero, 2015). The extreme version of this systematic-titling argument even led part of the "land administration" literature to propose "holistic" objectives, according to which surveying each land parcel was considered a requirement for good titling (Arruñada, 2018).

Land ownership by foreign nationals with a nominee agreement 'borrowing a name' is certainly caused by conditions that are actually legal smuggling. To get around this, the nominee agreement is made between foreign national and Indonesian citizen. With the nominee agreement, foreign nationals then can control a land with the the status of

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1. INTRODUCTION

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'Ownership Rights', executed by registering the land on behalf of Indonesian citizens who are indicated as a nominee. Law Number 5 of 1960 concerning Basic Agrarian Regulations (referred to as *UUPA*) is a legal instrument that regulates the land affairs and creates a single national land law, based on customary law as an original tailored to the interests of the community within developing countries. Land registration for landowners aims to obtain a certificate of land rights and strong legal certainty.

Guaranteeing legal certainty in the agrarian sector, especially in the land sector requires certainty of (Harsono, 2008):

- The land owner. This is concerning the subject of land title; certainty of this matter is necessary because the actions regarding the land on the basis of which only cause the desired legal treatment, if carried out by the owner.
- The land itself. This is about the object of the land title, that is, where the land is, how wide it is and what its boundaries are. This is a prevalence regarding the condition that everyone really wants certainty about these matters.
- The governing laws. This involves rules to find out the authorities and obligations of the owner legally.

Black's Law Dictionary writes the notion of nominee as:

"One designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, in representation of another, or as the grantee of another."

An authentic deed clearly stipulates that rights and obligations, which guarantee legal certainty at are, the same time, expected to minimize the occurrence of disputes even though the dispute may ultimately be unavoidable; in the dispute resolution process, authentic deed which is the strongest and most fully written evidence contribute significantly to the settlement of cases in a cheap cost and a quick way (Sjaifurrachman., & Habib, 2011). The vagueness of norms concerning whether legal actions are intentionally made so that the transfer of rights from Indonesian citizens to foreign nationals in a notary deed is called a nominee deed, due to existing legal regulations, but not clear or incomplete, so the judge is required to create a new law as a complement and or substitute for the law for him (Rifai, 2011).

2. METHOD

Law has a distinctive character. A distinctive feature of legal science is its normative nature (Hadjon, n.d.). In normative studies, all actions should hold on to the scientific tradition of law itself (Hadjon, Philipus M., & Djatmiati, 2005). In accordance with the character and tradition of legal science (Hadjon, Philipus M., & Djatmiati, 2005), normative research is a characteristic of the tradition of law. The approaches used in legal research are statue opprach, case opprach, and conceptual approach (Marzuki, 2005). We conducted this study using normative legal research designs. We examined the legal matters by reviewing existing legal theories and national legal regulations and then comparing them with the conditions that occur in the society that we identified through collecting results from several previous studies relevant to the use of nominees as collateral in obtaining ownership rights to land, rights to transfer land rights from Indonesian citizens to foreign nationals. We described these phenomena by analyzing them interpretatively, for then we could carry on new knowledge that are useful to the public blind to the law.

3. DISCUSSION

General Objectives of an Agreement

An agreement is an event where a

person promises to another person or where two people promise each other to do something (Subekti, 2001). In terms of its form, the agreement is in the form of a series of words containing promises or abilities that are spoken or written (Subekti, 2016). In a legal perspective, the agreement is a legal act concerning the property of wealth between two parties, where one promises or is considered promising to do something or does not do something, while the other is entiled to demand the implementation of it (Prodjodikoro, 1985).

- Based on the limitations in the definition above, the agreement is an act or legal act that is formed by achieving the word "agreement" which is a statement of free will of two people (parties) or more. The achievement of the agreement depends on the party that causes legal consequences for the interests of the one party and at the expense of the other party or reciprocally by heeding the statutory provisions (Budiono, 2011).
- According to Naja, the principles in contract law or agreement are as follows (Naja, 2007):
- Principle of consensualism (agreement), namely with the existence of "agreement", the related parties are bound, as stipulated in article 1320 of the Civil Code.
- The principle of freedom of contract, namely the existence of the widest possible freedom from the law given to the public to enter into agreements on anything, provided that they do not conflict with legislation, decency and public order. This is in line with what is stipulated in article 1338 paragraph (1) of the Indonesia Civil Code, which states that all agreements made legally apply as laws for those who make them.
- The Principle of Pacta Sunt Servanda or also referred to as the principle of legal certainty because a third party (including a judge because of his position) must respect the contents of the agreement or contract (may not cancel the contents of the agreement or contract). So called because the parties made an agreement or contract based on the belief that what was agreed upon, the implementation was guaranteed, including not to be interfered with by a third party or a judge because of his position.
- The principle of good faith (Goede Trouw), that is, both parties must apply to others based on propriety among respectful people without deception, deception and without trickery; not only seeing one's own interests, but also those of others. This principle is regulated in Article 1338 paragraph (3) of the Indonesian Civil Code.
- The principle of personality, also called the principle of personality, which is regulated in Article 1315 of the Indonesia Civil Code.

In essence, according to Salim, the agreement by type is divided into two, namely (HS, 2006):

- Nominaat Agreement

This is a known agreement in the Indonesia Civil Code. Matters included in the nomination agreement are buying and selling, exchanging, leasing, fellowship, civil, grant, safekeeping, borrowing, lending, lending, authorizing debt, peace, etc.

- Innominaat Agreement

This kind of agreement is one that arises, grows and develops in the community. This type of agreement has not been known when the Indonesian Civil Code was promulgated, one of which is the nominee agreement.

For the legitimation of an agreement, there are four conditions required:

The parties that will bind themselves

have agreed;

The ability of making an agreement;

There is a certain thing; and

For a lawful reason.

In Article 1320 paragraph (4) and Article 1337 of the Indonesian Civil Code concerning the Cause that is Halal, what is meant here is that the contents of the agreement do not conflict with law, decency and public order (Miru, Ahmadi., & Pati, 2008).

Again, agreements arise because of an agreement between the two parties. The agreement of both parties has fulfilled all the requirements for the validity of an agreement as referred to in Article 1320 of the Civil Code, namely:

Qiram Syamsuddin Meliala (Meliala, 2001)

- There is an intended agreement intention between the parties making the contract (consensus). What is meant by intended agreement is an agreement, all and the same between the two parties regarding the subject of the agreement issued. The intended agreement is free, that is to say, it actually occurs at the voluntary willingness of the parties; there is no compulsion at all from any party. Additionally, before approval is given, parties usually hold negotiations.
- The ability of parties to make an agreement (capacity). According to the provisions of Article 1330 of the Civil Code, the party that is said to be incapable of making an agreement is the one that physically immature, under-guarded and married. But as a development, married women are considered capable of carrying out legal actions.
- There are certain things (a certain subject matter). A certain matter is the subject of the agreement; is an achievement that needs to be fulfilled in an agreement; and is the subject of the agreement. Achievement must be determined or at least determined. What is agreed upon must also be clear, the type determined, the amount may not be stated, as long as it can be calculated or determined. The requirement that the achievement must be specifiable or determinable is to prescribe the rights and obligations of both parties if a dispute in implementing the agreement arises. If the achievement is vague legally, the agreement cannot be implemented, and is considered not to have an object of agreement. As a result of not fulfilling this condition, the agreement is null and void (void nietig).
- There is a legal cause, meaning that in making the agreement there is a reason that describes the objectives to be achieved by the parties. The law does not care about what causes people to enter into agreements. What is considered or monitored by law is the contents of the agreement, which describes the objectives to be achieved; whether it is prohibited by law or not, is it against public order and decency or not.

Trustee and Nominee Agreement

The trustee agreement, also known as nominee or name borrowing in the Anglo Saxon concept, is an agreement that is intended as a legal smuggling for foreign nationals to control the field of land owned by Indonesian citizens. In this case, a foreign citizen actually buys a plot of land ownership in Indonesia using the name of an Indonesian citizen, namely a 'property', which is actually purchased (paid) by the foreign citizen but registered as or on behalf of Indonesian citizens.

Meanwhile, in order to obtain legal protection for the ownership of rights to land purchased, among foreign nationals with Indonesian citizens, the agreement is in one or several agreements and even in

a statement of deed made, which states that Indonesian citizens are persons whose names are borrowed in the proof of ownership rights over land (a certificate), while the real owner is the foreign national. Such breakthrough or thing, in the life of society, is commonly referred to as nominee deed.

The use of nominees is a form of way for foreign citizens to fulfill their desires to own land. Thus, in everyday practice this action provides the possibility for foreign nationals to own land by "borrowing names" of nominees or trustees, which are clearly prohibited by the UUPA (Maria, 2014). Article 1320 of the Civil Code concerning the Legality of an Agreement, paragraph (4), states that a prohibited cause can be seen from Article 26 paragraph (2) of the UUPA, which reads:

Every sale and purchase, exchange, grant, gift with a will and other actions intended to directly or indirectly transfer ownership rights to foreigners, to a citizen who, besides Indonesian citizenship, has foreign citizenship or to a legal entity, except as stipulated by the Government referred to in Article 21 paragraph (2), it is null and void because the law and land fall to the State, provided that the rights of other parties which burden them continue and all payments that have been received by the owner cannot be reclaimed.

If the agreement agreed upon by both parties is null and void by law, the land falls to the state (Maria, 2014). The agreement can be null and void under the provisions of Article 1337 of the Indonesian Civil Code, a forbidden cause, and a disadvantaged third party is entitled to evoke this matter (Patrik, 1994).

Land Ownership by Foreign Citizens According to UUPA

Land ownership rights are the rights that give the owner the right to something with land (Perangin, 1994). The control of land title carried out by foreign citizens can only take place through the Right to Use, because the Right to Use is an incomplete relationship between the subject of rights and the object (land). Hence, only Indonesian citizens are fully connected with earth, water and space within the limits of provisions.

Rights of Use are not the same as Rights of Lease since they each have special characteristics and are separately regulated. Rights of Lease are only provided for buildings, not on land as well as rights to use. In a lease right, a person or a legal entity has a lease right over land if he has the right to use land owned by another person for building purposes by making payments to the owner in the form of an amount of money as rent. Unlike the Right to Use which can occur on state land or Rights of Ownership of land, Rights of Lease for buildings can only occur on land owned by Rights of Ownership. This is because the Rights of Ownership land is the strongest and most fulfilled right so that it can be used as the basis for granting other land rights, including Rights of Lease for buildings.

Specifcation of a Notarial Deed is Null and Void

An agreement that does not meet the objective requirements, ie the object is not certain and the prohibited authority will be null and void by law. Article 1335 of the Indonesian Civil Code confirms that an agreement without cause or that has been made for a reason that is false or forbidden does not have power. This proves that each agreement must have a legal cause. However, according to Article 1336 of the Civil Code, if there is no cause stated, but there is a reason that is lawful or if there is something other than stated, the agreement is valid. A cause is prohibited if prohibited by law, or if it is contrary to morality or public order.

The meaning of cancellation by law is more directed at the process of forming an agreement. The legal effect on the cancellation of the agreement is the return to the original position (Hernoko, 2008), as before the closing of the agreement. The cancellation of the agreement was due to the cancellation and deletion of the

agreement as meant in Article 1381 of the Civil Code. The cancellation of the agreement because of the cancellation has clearly erased the existence of the agreement, while the elimination of the agreement because the payment or fulfillment of achievements only removed the agreement itself but the existence of the agreement shall not deleted (Hernoko, 2008).

The deed that is qualified as a deed that has the power to prove under the hand and deed null and void of law can be required to pay damages to the notary, in the form of reimbursement, compensation and interest. This can be interpreted as a notary deed that is degraded and has the power of proof as an underhanded deed and a notary deed null and void, both of which can be prosecuted for reimbursement of costs, compensation and interest.

Sanctions for notary deeds have the power of proof as an underhanded deed and null and void deed is an external sanction, ie sanctions against a notary in carrying out his duties do not carry out a series of actions that must be performed on (or for the benefit of) the party facing the Notary and other resulting in the interests of the parties not being protected.

4. CONCLUSION

A nominee is an agreement involving two citizens of different countries as a means to obtain power in the form of ownership rights to land by foreign citizens. By using nominees, foreign nationals can control the land he buys, just as native citizens can master. In fact, the nominee agreement has not yet obtained a legitimate arrangement and is also unknown in the legal system in Indonesia, especially in the provisions concerning the legal system of agreements stipulated in the Indonesian Civil Code. Therefore, the parties who did so were found to have committed material violations because for Indonesian law it was a form of indirect transfer of rights from Indonesian citizens to foreign nationals. In addition, the nominee agreement does not have legal force and the nominee agreement deed made based on it is null and void.

Dispute resolution regarding the application of nominees in obtaining land rights by foreign citizens in Indonesia is carried out through litigation to obtain legal certainty over nominee deeds, because Indonesian land law is regulated in Special Laws. The legal effect of a notary who deliberately issues a nominee deed was personal liability as a general official in charge of making the deed of nominee agreements, namely accountability in a administrative, civil, notary and even criminal code of conduct.

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